Not To Be Published

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. RAUL SANCHEZ, Defendant.	No. CR98-4033-MWB No. CR97-4015-MWB **ORDER REGARDING DEFENDANT'S MOTION TO VACATE, SET ASIDE, OR CORRECT SENTENCE**

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I. INTRODUCTION AND FACTUAL BACKGROUND

On December 16, 1998, a two-count indictment was returned against defendant Raul Sanchez, charging him with possessing with intent to distribute approximately 2,274.2 grams of methamphetamine, in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(A), and possessing with intent to distribute 210.3 grams of methamphetamine, in violation of 21 U.S.C. § 841(a)(1).[1] The methamphetamine which forms the basis for these charges was discovered as a result of the search of a package.

Defendant Sanchez entered a conditional plea of guilty to two counts of possession with intent to distribute methamphetamine and he was sentenced to 168 months imprisonment. Defendant Sanchez appealed his conviction. His appeal was denied, as was his subsequent request for review by the United States Supreme Court. Defendant Sanchez then filed his current motion under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody. In his motion, Sanchez challenges the validity of his conviction on three grounds: 1) ineffective assistance of his trial counsel; 2) ineffective assistance of his appellate counsel, and 3) that the rule announced in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), should be applied to his motion. On initial review, the court dismissed Sanchez's claim under *Apprendi* because the nonretroactivity rule of *Teague v. Lane*, 489 U.S. 288 (1989) barred him from raising it in his § 2255 motion.

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[1] Defendant Sanchez was charged in case number CR97-4015-MWB, with conspiracy to distribute methamphetamine, in violation of 21 U.S.C. § 841(a)(1) and 846, and possessing with intent to distribute more than 2,963.47 grams of methamphetamine, in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(A), and possessing with intent to distribute 9.23 grams of cocaine, in violation of 21 U.S.C. § 841(a)(1). That case, which arose out of the same facts as case number CR98-4033-MWB, was dismissed without prejudice under the Speedy Trial Act.

Defendant Sanchez contends that the court's dismissal of his *Apprendi* claim was incorrect and that *Apprendi* is retroactive to an initial petition under § 2255.

II. LEGAL ANALYSIS

A. Standards Applicable To § 2255 Motions

The Eighth Circuit Court of Appeals has described 28 U.S.C. § 2255 as "the statutory analogue of habeas corpus for persons in federal custody." *Poor Thunder v. United States*, 810 F.2d 817, 821 (8th Cir. 1987). In *Poor Thunder*, the court explained the purpose of the statute:

> [Section 2255] provides a remedy in the sentencing court (as opposed to habeas corpus, which lies in the district of confinement) for claims that a sentence was 'imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack.'

Id. at 821 (quoting 28 U.S.C. § 2255). Of course, a motion pursuant to § 2255 may not serve as a substitute for a direct appeal, rather "[r]elief under [this statute] is reserved for transgressions of constitutional rights and for a narrow range of injuries that could not have been raised for the first time on direct appeal and, if uncorrected, would result in a complete miscarriage of justice." *United States v. Apfel*, 97 F.3d 1074, 1076 (8th Cir. 1996).

The failure to raise an issue on direct appeal ordinarily constitutes a procedural default and precludes a defendant's ability to raise that issue for the first time in a § 2255 motion. *Matthews v. United States*, 114 F.3d 112, 113 (8th Cir. 1997), *cert. denied*, 118 S. Ct. 730 (1998); *Bousley v. Brooks*, 97 F.3d 284, 287 (8th Cir. 1996), *cert. granted*, 118 S. Ct. 31 (1997); *Reid v. United States*, 976 F.2d 446, 447 (8th Cir. 1992), *cert. denied*,

507 U.S. 945 (1993) (citing *United States v. Frady*, 456 U.S. 152 (1982)). This rule applies whether the conviction was obtained through trial or through the entry of a guilty plea. *United States v. Cain*, 134 F.3d 1345, 1352 (8th Cir. 1998); *Walker v. United States*, 115 F.3d 603, 605 (8th Cir. 1997); *Matthews*, 114 F.3d at 113; *Thomas v. United States*, 112 F.3d 365, 366 (8th Cir. 1997) (per curiam). A defendant may surmount this procedural default only if the defendant "'can show both (1) cause that excuses the default, and (2) actual prejudice from the errors asserted.'" *Matthews*, 114 F.3d at 113 (quoting *Bousley*, 97 F.3d at 287); *see also United States v. Apfel*, 97 F.3d 1074, 1076 (8th Cir. 1996).

B. Analysis Of Issues

1. Ineffective assistance of counsel claims

Defendant Sanchez asserts twelve claims of ineffective assistance of counsel. Defendant Sanchez asserts that his counsel was ineffective in the following respects: (1) that his counsel failed to object to the probation report which did not indicate whether the controlled substance was l-methamphetamine or d-methamphetamine; (2) that his counsel failed to object to the failure of the government to show the type of narcotic involved by a preponderance of the evidence as to support the base level offense; (3) that his counsel failed to object to the testing of the Iowa Department of Public Safety since it did not determine whether the narcotic was l-methamphetamine or d-methamphetamine; (4) that since his counsel failed to object to the lack of determination of the type of methamphetamine involved, the lesser of the two types of methamphetamine should have been used to determine his base offense level; (5) that his counsel failed to object to the firearm which was found in a closed drawer of a dresser at defendant Sanchez's residence; (6) that his counsel failed to raise the argument that it was not unlawful for him to possess

that firearm at the time of the search of his residence; (7) that his counsel failed to argue that he was not present in the bedroom and did not have access to the firearm at the time of the search; (8) that his trial counsel should have argued that mere possession of the firearm was insufficient to sustain the firearm enhancement; (9) that his counsel was ineffective in not making a request for a downward departure on the basis that defendant Sanchez would be subject to deportation after the completion of his sentence; (10) that his counsel should have objected to the probation officer's finding that there were no other grounds for downward departure; (11) that his appellate counsel failed to provide a full and fair hearing on all available issues and arguments; (12) that his appellate counsel did not appeal the dismissal of the indictment without prejudice even though the issue was preserved for appeal in his plea agreement. The court will consider each of these claims *seriatim*.

All of the claims of ineffective assistance of counsel Sanchez has presented in his § 2255 motion were not raised on direct appeal. However, claims of ineffective assistance of counsel normally are raised for the first time in collateral proceedings under 28 U.S.C. § 2255. *See United States v. Martinez-Cruz*, 186 F.3d 1102, 1105 (8th Cir. 1999) (reiterating that ineffective assistance of counsel claims are best presented in a motion for post-conviction relief under 28 U.S.C. § 2255); *United States v. Mitchell*, 136 F.3d 1192, 1193 (8th Cir. 1998) (noting ineffective assistance of counsel claims more properly raised in 28 U.S.C. § 2255 motion) (citing *United States v. Martin*, 59 F.3d 767, 771 (8th Cir. 1995) (stating ineffective assistance of counsel claims "more appropriately raised in collateral proceedings under 28 U.S.C. § 2255")); *United States v. Scott*, 26 F.3d 1458, 1467 (8th Cir. 1994) (declining to consider ineffective assistance of counsel claims raised for first time on direct appeal where claim not raised in a motion for postconviction relief pursuant to 28 U.S.C. § 2255). In order to prove a claim of ineffective assistance of

counsel, a convicted defendant must demonstrate that (1) "counsel's representation fell below an objective standard of reasonableness;" and (2) "the deficient performance prejudiced the defense." *Id.* at 687*; Furnish v. United States of America*, 252 F.3d 950, 951 (8th Cir. 2001) (stating that the two-prong test set forth in *Strickland* requires a showing that (1) counsel was constitutionally deficient in his or her performance and (2) the deficiency materially and adversely prejudiced the outcome of the case); *Garrett v. Dormire*, 237 F.3d 946, 950 (8th Cir. 2001) (same). Trial counsel has a "duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 U.S. at 691. Indeed, "counsel must exercise reasonable diligence to produce exculpatory evidence[,] and strategy resulting from lack of diligence in preparation and investigation is not protected by the presumption in favor of counsel." *Kenley v. Armontrout*, 937 F.2d 1298, 1304 (8th Cir. 1991). However, there is a strong presumption that counsel's challenged actions or omissions were, under the circumstances, sound trial strategy. *Strickland*, 466 U.S. at 689; *see Collins v. Dormire*, 240 F.3d 724, 727 (8th Cir. 2001) (in determining whether counsel's performance was deficient, the court should "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance . . .") (citing *Strickland*). With respect to the "strong presumption" afforded to counsel's performance, the Supreme Court specifically stated:

> Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to

> reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy."

Strickland, 466 U.S. at 689 (citations omitted).

To demonstrate that counsel's error was prejudicial, thereby satisfying the second prong of the *Strickland* test, a habeas petitioner must prove that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id*. The court need not address whether counsel's performance was deficient if the defendant is unable to prove prejudice. *Apfel*, 97 F.3d at 1076 (citing *Montanye v. United States*, 77 F.3d 226, 230 (8th Cir.), *cert. denied*, 117 S. Ct. 318 (1996)); *see also Pryor v. Norris*, 103 F.3d 710, 712 (8th Cir. 1997) (observing "[w]e need not reach the performance prong if we determine that the defendant suffered no prejudice from the alleged ineffectiveness."). The Supreme Court has stated that "[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice . . . that course should be followed." *Strickland*, 466 U.S. at 697.

Here, the court is compelled to conclude that defendant Sanchez has not demonstrated that he was prejudiced by his counsel's alleged errors, either individually or in aggregate, and therefore cannot demonstrate ineffective assistance of counsel. For example, with respect to his claims of ineffective assistance of counsel concerning whether the controlled substance involved was l-methamphetamine or d-methamphetamine,

defendant Sanchez cannot show that he was prejudiced by his counsel's failure to raise the issue of l-methamphetamine versus d-methamphetamine. The type of methamphetamine involved here does not affect the length of Sanchez's sentence. Until the relevant guideline was amended in 1995, sentences for l-methamphetamine were lighter than for d-methamphetamine because one gram of l-methamphetamine was equivalent to 40 grams of marijuana while one gram of d-methamphetamine was equivalent to 1,000 grams of marijuana. *United States v. McCullen*, 86 F.3d 135, 138 (8th Cir. 1996); see *United States v. Ortega*, 150 F.3d 937, 944 (8th Cir. 1998), *cert. denied*, 525 U.S. 1087 (1999). "As of November 1, 1995, the distinction between methamphetamine types has been eliminated and l-methamphetamine is treated the same as d-methamphetamine under the sentencing guidelines." *United States v. Apfel*, 97 F.3d 1074, 1075 n.2 (8th Cir. 1996). The sentencing guidelines applicable to Sanchez are the ones in effect at the time the crime was committed. *See Apfel*, 97 F.3d 1074, 1075 n.2. Here, at the time Sanchez committed the offenses, in 1997, the sentencing guidelines in effect at that time did not make a distinction between l-methamphetamine and d-methamphetamine. Therefore, defendant Sanchez cannot demonstrate that he was prejudiced by his counsel's failure to raise the issue of l-methamphetamine versus d-methamphetamine.

The court reaches the same conclusion with respect to defendant Sanchez's claims that his counsel was ineffective in not challenging the firearm enhancement. During the execution of a search warrant, police seized a 9mm handgun with a loaded clip in the top of a dresser, along with an unopened envelope with defendant Sanchez's name on it. Methamphetamine was found in the closet of the same bedroom. Evidence was presented at the suppression hearing in this case that Efrain Caro had rented the residence to defendant Sanchez. Suppression Hrg. Tr. at 12. Defendant Sanchez's possession of the firearm increased his offense level by two points. Defendant Sanchez stipulated to the

enhancement in his plea agreement. Section 2D1.1(b)(1) of the United States Sentencing Guidelines provides for a two level increase in a defendant's base offense level "[i]f a dangerous weapon (including a firearm) was possessed." The government has the burden at sentencing to show by a preponderance of the evidence "that a weapon was present and that it is not clearly improbable that the weapon was connected with the criminal activity." *United States v. Belitz*, 141 F.3d 815, 817 (8th Cir. 1998); *see United States v. Calderin-Rodriguez*, 244 F.3d 977, 987 (8th Cir. 2001); *United States v. Vaughn*, 111 F.3d 610, 616 (8th Cir. 1997). The government can show that a weapon is connected with an offense "by establishing a temporal and spatial relation between the weapon, the defendant, and the drugs." *United States v. Moore*, 184 F.3d 790, 794 (8th Cir. 1999), *cert. denied*, 528 U.S. 1161 (2000); *see United States v. Payne*, 81 F.3d 759, 763 (8th Cir. 1996). The firearm enhancement may be based on constructive possession, which includes dominion or control over the premises where the item is located. *United States v. McCracken*, 110 F.3d 535, 541 (8th Cir. 1997). Here, the court could infer, from the presence of the loaded gun in the room with the drugs, that they were related. The spacial relationship between the pistol and the drugs was sufficient for enhancement under § 2D1.1(b)(1) *See Belitz*, 141 F.3d at 817 (affirming a district court's application of the enhancement, where a single firearm was kept in defendant's upstairs living room and drugs were kept in defendant's basement, even though defendant testified that he did not own the firearm); *United States v. Regans*, 125 F.3d 685, 686 (8th Cir. 1997) (firearm's physical proximity to narcotics may provide sufficient nexus), *cert. denied*, 523 U.S. 1065 (1998). Thus, each of Sanchez's claims of ineffective assistance of counsel related to the firearm enhancement fail the two-prong test of *Strickland* and its progeny. Defendant Sanchez has not made a showing which approaches a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Apfel*, 97 F.3d at 1076.

The court similarly finds that Sanchez has not shown that effective counsel should have moved for a departure based on his immigration status as a resident alien. The Eighth Circuit Court of Appeals has held that a sentencing court may grant a downward departure under U.S.S.G. § 5K2.0 for a defendant's willingness to waive resistance to deportation. *See United States v. Cruz-Ochoa*, 85 F.3d 325, 325-26 (8th Cir. 1996). The decision to depart or not is within the district court's discretion. *See United States v. Jauregui*, 314 F.3d 961, 963 (8th Cir. 2003); *United States v. Hernandez-Reyes*, 114 F.3d 800, 803 (8th Cir. 1997). More important, the Eighth Circuit Court of Appeals has held that a trial counsel's failure to move for a downward departure for a deportable alien's willingness to waive resistance to deportation did not constitute ineffective assistance of counsel. *United States v. Sera*, 267 F.3d 872, 873-75 (8th Cir. 2001).

Likewise, defendant Sanchez has not demonstrated that he was prejudiced by his appellate counsel's failure to challenge the dismissal of the indictment without prejudice even though the issue was preserved for appeal in his plea agreement. In assessing whether a dismissal is to be with or without prejudice, the Speedy Trial Act requires that the court consider "the seriousness of the offense; the facts and circumstances of the case which led to the dismissal; and the impact of a reprosecution on the administration of [the Act] and on the administration of justice." 18 U.S.C. § 3162(a)(1). In addition to these factors, the Supreme Court has indicated that prejudice to the defendant is also to be considered. *See United States v. Taylor*, 487 U.S. 326, 334 (1988). "Prejudice," in this context, is generally limited to a negative effect on a defendant's ability to mount a defense. *See, e.g., Patiwana v. United States*, 928 F. Supp. 226, 240 (E.D.N.Y. 1996). Here, while it is undisputed that defendant Sanchez was charged with serious offenses, *i.e.*, conspiracy to distribute methamphetamine, possessing methamphetamine with intent to distribute, and possessing cocaine with intent to distribute, the facts and circumstances of this case did not support

dismissal with prejudice. There was no evidence that the delay in this case was for improper purposes, or that the delay had prejudiced defendant Sanchez's ability to mount a defense. Additionally, the court found that there had been no showing of bad faith on the part of the government. Moreover, while defendant Sanchez now claims that he was prejudiced by the disappearance of a potential witness, he has offered no proof that the putative witness would have testified as alleged. Such vague and conclusory allegations of prejudice resulting from the absence of a witness are insufficient to constitute a showing of actual prejudice. Therefore, this part of defendant Sanchez's motion is denied.

2. Applicability of the Apprendi decision

Defendant Sanchez also claims that his sentence was incorrect because the United States Supreme Court's decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000) is applicable to his case and therefore he is factually innocent of the drug charge for which he was convicted because the drug type and quantity are elements of a crime and must be decided by the jury. Review of this issue is precluded by the Eighth Circuit Court of Appeals's conclusion that the *Apprendi* decision presents a new rule of constitutional law that is not of "watershed" magnitude and, consequently, petitioners may not raise *Apprendi* claims on collateral review. *Hines v. United States*, 282 F.3d 1002, 1004 (8th Cir.), *cert. denied*, 537 U.S. 900 (2002); *Sexton v. Kemna*, 278 F.3d 808, 814 n.5 (8th Cir. 2002), *cert. denied*, 537 U.S. 1150 (2003); *Murphy v. United States*, 268 F.3d 599, 600 (8th Cir. 2001), *cert. denied*, 534 U.S. 1169 (2002); *Jarrett v. United States*, 266 F.3d 789, 791 (8th Cir. 2001), *cert. denied*, 535 U.S. 1007 (2002); *United States v. Dukes*, 255 F.3d 912. 913 (8th Cir. 8th Cir. 2001), *cert, denied*, 534 U.S. 1150 (2002); *United States v. Moss*, 252 F.3d 993, 995 (8th Cir. 2001), *cert. denied*, 534 U.S. 1097 (2002). This view of the *Apprendi* decision has also been adopted by a clear majority of the other federal courts of appeals. *See, e.g., Sepulveda v. United States*, 330 F.3d 55 (1st Cir. 2003); *Coleman v.*

United States, 329 F.3d 77 (2d Cir.), *cert. denied*, 124 S. Ct. 840 (2003); *United States v. Brown*, 305 F.3d 304 (5th Cir. 2002); *Goode v. United States*, 305 F.3d 378 (6th Cir.), *cert. denied*, 537 U.S. 1096 (2002); *Dellinger v. Bowen*, 301 F.3d 758 (7th Cir. 2002), *cert. denied*, 537 U.S. 1214 (2003); *United States v. Sanchez-Cervantes*, 282 F.3d 664 (9th Cir.), *cert. denied*, 537 U.S. 939 (2002); *United States v. Sanders*, 247 F.3d 139 (4th Cir.), *cert. denied*, 534 U.S. 1032 (2001); *McCoy v. United States*, 266 F.3d 1245 (11th Cir. 2001), *cert. denied*, 536 U.S. 906 (2002). Therefore, the court is unable to reach the merits of Sanchez's claim.

C. Certificate Of Appealability

Defendant Sanchez must make a substantial showing of the denial of a constitutional right in order to be granted a certificate of appealability in this case. *See Miller-El v. Cockrell*, 123 S. Ct. 1029, 1039 (2003); *Garrett v. United States*, 211 F.3d 1075, 1076-77 (8th Cir. 2000); *Mills v. Norris*, 187 F.3d 881, 882 n.1 (8th Cir. 1999); *Carter v. Hopkins*, 151 F.3d 872, 873-74 (8th Cir. 1998); *Ramsey v. Bowersox*, 149 F.3d 749 (8th Cir. 1998); *Cox v. Norris*, 133 F.3d 565, 569 (8th Cir. 1997), *cert. denied*, 525 U .S. 834 (1998). "A substantial showing is a showing that issues are debatable among reasonable jurists, a court could resolve the issues differently, or the issues deserve further proceedings." *Cox*, 133 F.3d at 569. Moreover, the United States Supreme Court reiterated in *Miller-El* that "'[w]here a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong.'" *Miller-El*, 123 S. Ct. at 1040 (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)). The court determines that Sanchez's petition does not present questions of substance for appellate review, and therefore, does not make the requisite showing to

satisfy § 2253(c). *See* 28 U.S.C. § 2253(c)(2); FED. R. APP. P. 22(b). With respect to Sanchez's claims, the court shall not grant a certificate of appealability pursuant to 28 U.S.C. § 2253(c).

III. CONCLUSION

Defendant Sanchez's § 2255 motion is **denied**, and this matter is **dismissed in its entirety**. Moreover, the court determines that the petition does not present questions of substance for appellate review. *See* 28 U.S.C. § 2253(c)(2); FED. R. APP. P. 22(b). Accordingly, a certificate of appealability will not issue.

IT IS SO ORDERED.

DATED this 27th day of September, 2004.

Mark W. Bennett

MARK W. BENNETT
CHIEF JUDGE, U. S. DISTRICT COURT
NORTHERN DISTRICT OF IOWA